IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 955

HOWARD T. FOULKES, ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO IN THE WILL OF CHARLES DURKEE, DECEASED, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

REPLY TO MEMORANDUM OF RESPONDENT IN OPPOSITION

Petitioner respectfully represents that the Memorandum in Opposition is deficient and is rebutted for two distinct reasons:

(A) It does not properly advise the Court of the facts pertaining to this case as concerns the Kuykendall Case, the Treasury Department press release of January 26, 1914 respecting repudiation of the Trust under the Thurman Act and its relevancy to the Durkee claim, and its denial of the

applicability of the Lost Bond Case to the Durkee claim is without verification as to any other purpose.

(B) It did not discuss the question of the material issue of facts raised by the Petition. It did not admit nor deny the existence of Secretary of State Frelinghuysen's statement of January 19, 1885 pertaining to the six main points raised by L. C. Blaisdell in his affidavit filed in the United States District Court in Utah. The Respondent quoted the Court's reference to Blaisdell's testimony as being "incoherent, disjointed, and pointless." The Court's opinion further referred to Blaisdell as being "mentally unbalanced." Nor did it discuss other material evidence now in the Appendix to the Petition bearing on a factual issue.

(1) With respect to Reason (A) and the Kuykendall decision, rendered by the 8th Circuit Court of Appeals (hereinafter referred to as Court), bearing upon the decision's control of any action filed by the Durkee estate, Petitioner submits:

(a) The decision, rendered in 1908, hardly covered the jurisdictional issue raised in the Appellate Court. The Court admitted Durkee was not a resident of Utah on the date of his death. The decision erroneously stated Durkee died in Wisconsin in 1870. He died in Omaha, Nebraska January 14, 1870. Thus, the jurisdictional issue should have been dispositive of the appeal rather than the ownership issue.

(b) The parties to this present action, the legal representatives of the Durkee estate from Wisconsin, the State of his residence, and the United

States, were not parties in the Utah suit and the Utah decision had no reference to either of them and was not binding upon either of them.

(c) The Utah decision, on the ownership issue, centered around what Blaisdell said at a meeting he had with Treasury Department officials and Cabinet officers on April 22, 1884. The decision stated that a *reading* of his testimony furnished *ample proof* he was "visionary," "impractical," and "mentally unbalanced," and that his *statements* were "incoherent, disjointed, and pointless." Further, it referred to his "straggling statement," and said "His version of what occurred, what was said, and what was the exact subject matter of the discussion is so vague and disjected as to *mystify rather than to enlighten.*"

(d) Blaisdell's testimony before the Court was by affidavit and the decision should have recognized this and that he did not want to have anything to do with the suit in Utah and did not authorize the suit. Thus, the lower court had no opportunity to observe him as a witness or to appraise his demeanor or ability to testify. Such references to him quoted in the 1908 decision are not justified nor appropriate and exceed judicial fairness.

(e) The Respondent's memorandum referred to the Court offering Kuykendall counsel the opportunity of bringing in Senator Teller to testify there, ore tenus, which offer was declined. This was not Blaisdell's case, nor Petitioner's. In addition to Senator Teller, who had attended the April 22, 1884 meeting in question, as Secretary of Interior, there were alive in 1908, Dr. Thomas Robinson, U. T. Wyman, Eugene B. Daskam, and

William Fletcher, who also attended the meeting. The latter two had local Washington addresses in 1908 and Daskam was still a Treasury Department official. There was also Speaker of the House Joseph G. Cannon who introduced Blaisdell to First Comptroller Lawrence and Secretary of the Treasury Folger. All the names of these officials were before the Utah Court when it heard the appeal arguments.

(f) The Court, being aware there was a person alive who attended the April 22, 1884 meeting, and inquiry could have ascertained the existence of the others, should have remanded the case to the lower court for the purpose of taking any additional testimony on this vital ownership question in view of its attack upon Blaisdell's credibility because of lack of corroboration. Blaisdell gave identically the same testimony, *in person,* before a United States Senate Sub-Committee (Senate Document 314, 54th Congress, 1st Session) on March 19, 1896, that he gave in affidavit form before the lower Utah Court. No other public official or body described him mentally unbalanced, visionary, or said his statements were incoherent or pointless. Nor did the Court consider the corroborative evidence in the case and before the Court, of former Congressman DeWeese, on the ownership question.

(g) The Appellate Court did not have before it the statement of Secretary of State Frelinghuysen, dated January 19, 1885. Blaisdell had referred to this statement, and the fact he had secured it, in his testimony before the Senate sub-committee on March 19, 1896, at page 417. The Frelinghuy-

sen statement corroborated the six main points of Blaisdell's testimony both before the Senate sub-committee and the Utah Court as to what transpired at the April 22, 1884 meeting. These points are (a) the principal parties present, (b) the examination of his credentials, as the Durkee representative, by First Comptroller Lawrence, (c) the statement by Secretary Folger that Durkee was the sole assignee of all the Pacific railroad First Mortgage Bonds, (d) the directive to Lawrence to make a record of the meeting, (e) that all present saw the bonds and the assignment, and (f) the Government guaranteed principal and interest through December 31, 1884. The Frelinghuysen statement was over the Great Seal of the United States. Thus, the ownership ruling was inappropriate and clearly erroneous since it did not have all the available evidence upon which to base a decision. And if there was mystification and non-enlightenment in Blaisdell's affidavit to the Utah Court, a comment or ruling by the Court on the Frelinghuysen statement, over the Great Seal, should have been made. The lack of it by that Court, or any Court, in view of its importance as a public document, should render any decision on the ownership question null and void.

(h) With reference to the Respondent's quoting the Kuykendall opinion that it was incredible Durkee did not mention this fortune in his will, Petitioner, here, refers to the evidence thereon before the Court. That Court had the testimony of former Congressman DeWeese, who, in referring to the railroad bonds, stated that although Durkee owned or controlled all of them, they were worth

around 10¢ on the dollar. Thus, if there was a fortune in 1869 it was, at most, an indeterminable paper one.

(i) Respondent refers to the Stearns mail fraud case. The Court in that case distinguished between collecting money for what it considered an unfounded claim but with an honest intent, and collecting money for the benefit of the defendants only. The Stearns case, however, did not have as as much evidence before it on the ownership question as did the Utah Court wherein the latter opinion was quoted approvingly in the former. Thus, we have two cases, one relying on the other, and both with insufficient evidence to decide the ownership issue.

(j) With respect to the Treasury press release, relied upon by Respondent as constituting a repudiation of the trust, that release cannot serve inconsistent purposes as advanced by Respondent. If the Trust was repudiated no later than 1914 by the release, to commence the running of the statute of limitations, there would have to be an acknowledgment of a trust. However, Respondent says in the same paragraph the release is authority for its position there is no basis for the Durkee claim. Either there is an admission of a trust with a repudiation, or a denial that a trust existed which renders a repudiation impossible. Additionally, Petitioner contends the press release, prepared under the Secretaryship of William McAdoo (a former railroad lawyer) does not accurately state the facts as to the Durkee claim, its dealings with the Government departments, does not accurately state the facts respecting the First Mortgage

Bonds, nor the legal status of the Trust Fund set up by Congress under the Thurman Act. Petitioner is prepared to submit substantial evidence on these points.

(k) Respondent states the Lost Bond Case has no conceivable relation to this case. The decision, written by First Comptroller Lawrence, dated April 22, 1884, was for the purpose of establishing an express trust by the Government on behalf of the Durkee estate. A *reading* of the decision, itself, clearly shows it could only have referred to the First Mortgage Bonds discussed at the April 22, 1884 meeting and could not have been rendered for any other purpose. Also, the decision is the actual record of the April 22, 1884 meeting Lawrence was requested to make. It says, "Held for decision of 'ownership' and a *proper record* is to be made to protect the rights of claimants."

(2) With respect to question (B), Respondent remained silent and did not offer evidence or coment on the material facts issue. This silence is very significant. As the Respondent states, the Durkee claim is almost a century old, and so is the reluctance of Respondent to discuss the issues or talk about the facts upon which it is based. The Respondent, despite all the conceivably valid contentions raised, has never been required to answer them or to stand trial on the merits of this claim. Respondent has too long evaded its clear public responsibilities in this case. It should not be permitted to stand upon a Court decision that a reading of shows it to be prejudicial, and an examination of it, based upon the issues involved and the evidence available, clearly indicate it to be below the dignity of the judiciary and not applicable in this case.

Nor should Respondent be permitted to find refuge in a mere press release so inaccurately worded that not only is its worth as a public document in serious question but that the purpose for which it was intended is debatable. Further, there is no evidence in the record it was ever published or delivered to the Durkee estate.

Specifically, the Respondent has never discussed or explained:

(a) The testimony given by Senator John Sherman on the floor of the United States Senate on April 9, 1869, wherein he referred to the perhaps illegal deposit of $3,000,000 of Union Pacific First Mortgage Bonds with the United States. This appears to be a contradiction of the Respondent's position taken in the January 26, 1914 press release where it is stated that no bonds have been deposited with any branch of the Government except those in pursuance of the April 10, 1869 resolution. The bonds referred to in the Finance Report, cited by the release, were not First Mortgage Bonds.

(b) The statement of Secretary of State Frelinghuysen dated January 19, 1885. This statement, over the Great Seal of the United States and set out in Exhibit C of the Petition, is a Government admission of ownership, thus Respondent's reluctance to discuss it stands as an admission of its validity. Also, the fact that this statement is corroborative of all that Blaisdell said with respect to the six main points raised in his testimony before the Appellate Court and the Senate would render the 1908 Court decision valueless on the ownership question. Respondent should be re-

quired to admit or deny this very important document.

(c) The evidence set out in Exhibit D of the Petition pertaining to correspondence Blaisdell had with the Treasury on April 30, 1884. These two documents were found in the Treasury archives. The memorandum attached to the letter, in the handwriting of Treasury officials, shows a reply was made to the letter. This evidence also should confirm there was a meeting on April 22, 1884 and that there was correspondence pertaining thereto. It should also satisfy the Court's reference to the Treasury Department's known exactness in record keeping, for the reply, referred to above, was not found. Respondent should be required to admit or deny the above documents and their applicability to this claim.

(d) The deposition of William R. Russell set out in Exhibit B. This deposition states that the First Mortgage Bonds of the Pacific railroads were in the Treasury Department vaults and were taken therefrom and delivered to the New York Sub-Treasury for redemption. Respondent should be familiar with Russell's duties and responsibilities.

In view of the Petition filed herein, the memorandum in opposition filed by Respondent, and the reply submitted herewith, together with other substantial evidence now in Petitioner's possession bearing upon the validity of this claim, Petitioner prays that this Petition for a Writ of Certiorari be granted and that

this cause be returned to the Court of Claims for further action.

Respectfully submitted.

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